THE HIGH COURT OF SWAZILAND PROFESSOR DLAMINI

Applicant

And

AFRICAN ECHO (PTY) LTD

Defendant

Civil Case No. 777/2004

Coram S.B. MAPHALALA – J

For the Applicant MR. P. SHILUBANE

For the Defendant MR. P. DUNSEITH

JUDGEMENT

(06/08/2004)

By combined summons dated 14th March 2004, Plaintiff issued summons for defamation against the Defendant which is a newspaper. In the Particulars of Claim the Plaintiff alleges that on 12th November 2003 at Mbabane within the jurisdiction of this court the Defendant caused to be printed and published in the "Times of Swaziland" a caption together with the plaintiff's photograph in which the following was stated:

"Mbabane Pudemo's activist Professor Dlamini (v) with lawyer Mandla Mkhwanazi at the High Court yesterday. Dlamini is currently facing 15 counts ranging from murder, kidnapping and robbery with five others"

On the 13th November 2003 the Defendant again caused to be printed and published a similar statement in the "Times of Swaziland" a copy of the newspaper in which the statement was made annexed as "B".

The Plaintiff further alleges that the said caption and statements are false and defamatory of him because at the time he was not facing a charge of murder or kidnapping, and the caption and statement were intended and understood by the readers of the newspaper that he was a murderer and a kidnapper. As a result of the defamation he has been damaged in his reputation and fair name in the sum of E75, 000-00 made up as follows:

Reputation - E35,000-00

Fair name - E40,000-00

Consequently the Plaintiff claims from the Defendant:

1. Payment of the sum of E75, 000-00;
2. Interest thereon at the rate of 9% per annum a tempore morae;
3. Costs of suit;
4. Further or alternative relief.

The Defendant has filed a plea in which it states, inter alia the following:

1. In paragraph 4 of the plea, Defendant admits that it published a statement, in which it states that Plaintiff was facing a charge of murder or kidnapping but avers that the publication was a result of a bona fide error.
2. In paragraph 4.2 of the plea, the Defendant avers that it tendered an apology to Plaintiff and a correction of the statement.

The Plaintiff has filed a notice of exception to the Defendant's plea. This aspect of the matter is the subject of this judgment. The following grounds are advanced that the Defendant's plea does not disclose a defence:

a) "The plaintiff's claim is based on a claim for damages for defamation, against the Defendant which is the publisher of the "Times of Swaziland".

b) Defendant admits publication but denies that the Plaintiff was defamed thereby.
c) Defendant's plea being a bare denial does not constitute a defence because a member of the public media cannot rely on absence of animus iniuriandi in order to escape liability for a defamatory publication disseminated via the public media in as much as it is trite law that the media is strictly liable for publication of defamatory statements.

It was contended for the Plaintiff that in defamation cases involving the media a plea of "error" as a justification for publishing a defamatory statement is not permissible. The case of Pakendorf En Andere De Flamingh 1982 (3) S.A. 146 (A) was cited in support of the plaintiff's argument. In this case it was held that the press, radio and television are strictly liable for publishing defamatory matter. In that case the facts were as follows: De Flamingh, a practising Advocate, instituted actions against the owners and editors of two newspapers for damages for defamation. The actions arose from reports in the newspapers in which it was mentioned that a Judge had said in his judgement in a civil case, in which the Plaintiff had appeared, that the Plaintiff and an attorney (according to the report in one of the newspapers) had so "overwhelmed" one V, who did not have legal representation, in a maintenance court case "that she did not know that she was not obliged to have an interview with them". In fact the Advocate referred to by the Judge was not De Flamingh but another Advocate. De Flamingh alleged that the reports were defamatory in that they imputed unethical and professional conduct on his part.

Kirk-Cohen AJ who heard the matter a quo said that the publication of defamatory matter gives rise to a presumption that the words were published intentionally and that the publication was unlawful and thus embracing the English law principle of strict liability.

The matter went on Appeal before the Appellate Division where Rumpff C J delivered - the unanimous judgment of the Appellate Division, The learned Chief Justice stated that, after hearing argument in the case, he was convinced that strict liability of the press, which is a strand from the English law is woven into our law of defamation, should be retained. The court held that, on grounds of authority and the dictates of public policy, the press, radio and television are strictly liable for the publication of defamatory matter.

Mr. Dunseith arguing for the Defendant in the present case contended that the plaintiff's exception is ill-conceived because the doctrine of strict liability has been soundly rejected. For this proposition the court's attention was drawn to the case of National Media vs Bogoshi 1998 (4) S.A, 1195 (SCA). The argument here is that the Pakendorf case (supra) was wrongly decided.

However, Mr. Shilubane for the Plaintiff retorted that the Bogoshi case (supra) was decided within the ambit of the recent constitutional dispensation in South Africa where a Bill of Rights has been enshrined in the Constitution of that country. Therefore, so the argument goes, the common law in

Swaziland is as enunciated in Pakendorf (supra).

The vexed issue for determination in casu therefore is whether the common law of this country is stepped in the tradition of "strict liability" as enunciated in the Pakensdorf case or whether the court is to follow the more flexible approach adopted in the case of Bogoshi (supra).

Before attempting to address the question it is imperative that I sketch the facts in the Bogoshi case. In that case, the Appellants, being the owner and publisher, editor, distributor and printer respectively of a newspaper, had been sued by the Respondent for damages arising from the publication of a series of allegedly defamatory articles published in the newspaper between 17 November 1991 and 29 May 1994. The Appellants had applied to amend their plea by the introduction of three additional defences. In essence, the third of the proposed additional defences was (a) the Appellants had been unaware of the falsity of any averment in any of the articles; (b) had not published recklessly, i.e. not caring whether the contents of the articles had

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been true or not; (c) had not been negligent in publishing any of the articles; (d) by - virtue of the averments and supporting facts in (a), (b) and (c) publication had therefore objectively been published without animus iniuriandi. It was submitted, therefore, that the publication had been lawful. A Provisional Division relied on Pakerndorf and upheld the Respondent's exception to the proposed plea, holding that, since the Appellants could escape liability, were the articles to be found defamatory, only if they could at least establish that they had published was true, their proposed plea was bad in law.

Both in the court a quo and on appeal it was argued for the Appellants that the Pakerndorf case - The effect of which was that, unlike ordinary members of the community (and newspaper distributors), newspaper owners, publishers, editors and printers were liable without fault and, in particular, were not entitled to rely upon their lack of knowledge of defamatory material in their publications or upon an erroneous belief in the lawfulness of the publication of defamatory material had wrongly been decided and that the proposed defence was valid under the common law. In the alternative it was argued that strict liability of members of the press was unconstitutional because (i) it impinged upon the right to freedom of speech and of expression, which included freedom of the press and of the media, conferred by Section 15 (1) of the Constitution of the Republic of South Africa Act No. 20 of 1993; and (ii) it was not in accordance with the spirit purported and object of Chapter 3 as required by Section 35 (3) of the interim constitution.

On appeal the Supreme Court of Appeal (per Hefer JA, Hoexter JA, Harms JA, Plewman JA and Farlam AJA) held, inter alia, as follows at pages 1210 to 1211 (paragraph F in fin C): and I quote:

"In endorsing this view I should add that it makes no difference that South Africa has only recently acquired the status of a truly democratic country. Freedom of expression, albeit not entrenched, did exist in the society that we knew at the time when Pakendorf was decided (Hix Networking Technologies v System Publishers (Pty) Ltd and another 1997 () S.A. 391 (A) at 400 D - G) although its full import, and particularly the role and importance of the press, might not always have been acknowledged.

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If we recognise, as we must, the democratic imperative that the common good is best served by the free flow of information and the task of the media in the process, it must be clear that strict liability cannot be defended and should have been rejected in Pakendorf. Much has been written about the "chilling" effect of defamation actions but nothing can be more chilling than the prospect of being mulcted in damages for even the slightest error. I say this despite the fact that some eminent writers such as Prof FC Van der Wait (op cit) and Neething, Potgieter and Visser Law of Delict 2nd ed at 351 - 2 hold a different view. Others like Prof Burchell (op cit at 189), Van der Merwe and Olivier Die Onregmatige Daad in die Suid-Afrikaanse Reg 6th ed at 440 and Prof PJ Visser (1982 THRHR 340) have criticised the decision in Pakendorf. Strict liability has moreover been rejected by the Supreme

Court of the United States of America (Gertz v Robert Welch Inc (supra at 525), the German Federal Constitutional Court (12 BverfGe 113), the European Court of Human Rights (Lingens v Austria (1986) 8 EHRR 407), the Courts in the Netherlands (as appears from Asser's work to which I will refer later), the English Court of Appeal, the High Court of Australia (in decisions to which I will also refer) and the High Court of New Zealand (Lange v Atkinson and Australian Consolidated Press Nz Ltd 1997 (2) NZLR 22 - the decision was confirmed on appeal in a judgment not available to me but part of which is quoted in the unreported judgment of the Court of Appeal referred to earlier).

In my judgment the decision in Pakendorf must be overruled. I am, with respect, convinced that it was clearly wrong. That does not mean that its conclusion on the facts of the case is assailable. The defamatory statement was the result of unreasonable conduct in obtaining the facts by incompetent journalists (at 154H)". (my emphasis).

The author Jonathan M. Burchell in his textbook titled, Personality Rights and Freedom of Expression The Modern Action Injuriarum) at page 223 has this to say on the subject; thus:

"Sixteen years before Bogoshi was decided in the Supreme Court of Appeal the terse judgment of Rumpff CJ in Pakendorf v De Flamingh had epitomized the court's dismissive attitude to free speech in a unanimous decision imposing strict (or no fault) liability on the mass media, a judgment which contained not even passing reference to strict liability's potentially detrimental impact on media freedom.

The Appellate Division in Neething v Du Preez; Neething v The Weekly Mail, by imposing an onus on the Defendant of proving a defence excluding unlawfulness, ensured that it would run the risk of relinquishing its inherent authority to develop the common law in accordance with constitutional norms to the Constitutional Court. Fortunately for the intergrity of the common law, the Supreme Court of Appeal in Bogoshi has reaffirmed its commitment to

freedom of expression, and in particular media freedom, by holding unanimously that the approach in Pakendorf was clearly wrong and had to be overruled".

Further on at page 224 the learned author continues:

"The policy decision to impose strict (or no - fault) liability on the mass media under the common law in Pakendorf paid no attention to the demands of freedom of expression and is clearly wrong for this reason".
At page 225 of the same work the author states the following:

"The judgment in Bogoshi is based on the common law rather than an evaluation of the constitutional emphasis on freedom of expression".

The same author in his work titled The Law of Defamation in South Africa, 1985 commenting on the case of Pakendorf states the following at page 184:

"In dealing with the argument that strict liability can only be introduced by statute, Rumpff CJ cited certain South African authority to substantiate the view that common law precedent exists for such a principle. No English case authority was cited, but the Chief Justice stated that the English law favours strict liability of the press, although he did not acknowledge that the common law position in England has been alleviated by a statute enacted in 1952 which deals with "unintentional defamation" and which would cover the press. In passing, the Chief Justice mentioned that a similar provision might, if necessary, be considered by our legislature".

It would appear to me on reading the authorities on this subject that the case of. Pakendorf (supra) was soundly overruled by Bogoshi as having been wrongly decided in its application of the common law. Further the argument by Mr. Shilubane that we should be wary of the Bogoshi judgment as it was decided within the realm of the South African Constitution is answered by what Hefer JA at page 1210

F in fin G stated; and I quote:

"In endorsing this view I should add that it makes no difference that South Africa has only recently acquired the status of a truly democratic country. Freedom of expression, albeit not entrenched, did exist in the society that we knew at the time when Pakendorf was decided (Hix Networking Technologies vs System Publishers (Pty) Ltd and another 1997 (1) S.A,

391 (A) at 400D - G) although its full import, and particularly the role and importance of the press, might not always have been acknowledged.

If we recognise, as we must, the democratic imperative that the common good is best served by the free flow of information and the task of the media in the process, it must be clear that strict liability cannot be defended and should have been in Pakendorf.

It would appear to me that the ethos embodied in the Draft Constitution of this country were a Bill of Rights is to be enshrined demand that the common good will be best served by the free flow of information and the task of the media in the process, strict liability therefore cannot be defended in these circumstances. Strict liability for the media as established by the judgment in Pakendorf eliminated any role for fault (including knowledge of unlawfulness) of whatever nature, in the proceedings against the mass media. Therefore a mistake by the mass media, or ignorance on their part as regards one of the elements necessary to establish a prima facie case of defamation, that is the publication of defamatory matter referring to the Plaintiff, would not excuse, even if it were bona fide, genuine and reasonable.

I am further of the considered view that the Bogoshi judgment reflects the position of our common law in this regard.

In the result, I rule that the Defendant's plea discloses a defence, namely denial of animus inuriandi and unlawfulness, and the exception is dismissed and costs to be costs in the cause.

S.B.MAPHALALA

JUDGE